

A Azlin bin Khalid v Mohamad Najib Ishak and other appeals

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS
W-02(IM)(MUA)-1370-08 OF 2015, W-02(IM)(MUA)-1371-08 OF
2015, W-02(IM)(MUA)-1450-09 OF 2015, W-02(IM)(MUA)-1480-09
OF 2015, W-02(IM)(MUA)-1481-09 OF 2015,
W-02(IM)(MUA)-1521-09 OF 2015 AND W-02(IM)(MUA)-1522-09
OF 2015
C ZAWAWI SALLEH, ABANG ISKANDAR AND AHMADI ASNAWI JJCA
10 OCTOBER 2017

D *Civil Procedure — Summary judgment — Application for — Appeal against
grant of summary judgment and striking out — Whether learned judge erred in
granting summary judgment applications and striking out applications — Central
Bank of Malaysia Act 2009 s 56 — Rules of Court 2012 O 14, O 18 r 19(1)(a)
& (b)*

E These appeals arose out of the High Court's decision which granted Kuwait
Finance House (M) Bhd's (the plaintiff in the High Court) applications for
summary judgment against Jasmy bin Ismail, Shahrir Abdul Jalil and
Mohamad Najib Ishak (the first, second and fourth defendants in the High
Court) for the outstanding amounts under an *Ijarah* facility granted by the
plaintiff to Jas Marine (L) Ltd ('the customer'), to finance the acquisition of a
F vessel, which was guaranteed by the defendants; and the plaintiff's application
to strike out the first, second and fourth defendant's counterclaim against the
plaintiff. The issue arose was whether the learned judge erred in granting the
summary judgment applications and the striking out applications in favour of
G the plaintiff.

Held, allowing the appeal in respect of summary judgment applications and
dismissing the striking out applications:

H (1) The appeal by the defendants in respect of the summary judgement
application must succeed. The court agreed with the submissions of the
defendants that the issues of whether the financing agreements and the
financing facilitation were in breach of the Shariah Advisory Council
(‘SAC’) Resolution and whether the put option notice dated 1 April 2011
I were in breach of the SAC Resolution gave rise to bona fide Shariah issue
which required the High Court to invoke s 56 of the Central Bank of
Malaysia Act 2009 (‘the Act’) and the learned judge was not in position to
decide on Shariah law questions in Islamic finance (see paras 47–48).

- (2) The court agreed with the submissions of the plaintiff that the defendant's attempt to invalidate their guarantees flew in the face of undisputed contemporaneous documents. This was due to the fact that the defendants had admitted to the debt in writing under the *Ijarah* facility. Besides that, under the guarantee, the defendants had agreed to pay on demand, not merely as surety but as principal debtor, all monies due and owing to the customer (see paras 50 & 52).

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[Bahasa Malaysia summary]

Rayuan-rayuan semasa timbul daripada keputusan Mahkamah Tinggi yang membenarkan permohonan-permohonan penghakiman terus oleh Kuwait Finance House (M) Bhd (plaintif di Mahkamah Tinggi) terhadap Jasmy bin Ismail, Shahrir Abdul Jalil dan Mohamad Najib Ishak ('defendan pertama, kedua dan keempat di Mahkamah Tinggi) bagi jumlah-jumlah tertunggak di bawah kemudahan *Ijarah* yang diberikan oleh plaintif kepada Jas Marine (L) Ltd ('pelanggan') untuk membiayai pembelian sebuah kapal, yang dijamin oleh defendan-defendan; dan permohonan plaintif untuk membatalkan tuntutan balas oleh defendan pertama, kedua dan keempat terhadap plaintif. Isu yang timbul adalah sama ada hakim bijaksana terkhilaf dalam membenarkan permohonan-permohonan penghakiman terus dan permohonan-permohonan pembatalan yang memihak kepada plaintif.

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Diputuskan, membenarkan rayuan berkenaan dengan permohonan-permohonan penghakiman terus dan menolak permohonan-permohonan pembatalan:

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- (1) Rayuan daripada defendan-defendan berkenaan dengan permohonan penghakiman terus mesti berjaya. Mahkamah bersetuju dengan hujahan defendan-defendan bahawa isu-isu sama ada perjanjian-perjanjian pembiayaan dan kemudahan pembiayaan melanggar Resolusi Majlis Penasihat Syariah ('MPS') dan sama ada notis 'put option' bertarikh 1 April 2011 melanggar Resolusi MPS telah menimbulkan isu Syariah yang bona fide yang memerlukan Mahkamah Tinggi untuk menggunakan s 56 Akta Bank Negara Malaysia 2009 ('Akta') dan hakim bijaksana bukan dalam kedudukan untuk memutuskan persoalan-persoalan undang-undang Syariah di dalam Kewangan Islam (lihat perenggan 47-48).
- (2) Mahkamah bersetuju dengan hujahan-hujahan plaintif bahawa percubaan defendan untuk membatalkan jaminan mereka adalah bertentangan dengan dokumen-dokumen semasa yang tidak dipertikaikan. Ini disebabkan oleh fakta bahawa defendan-defendan telah mengakui hutang secara bertulis di bawah kemudahan *Ijarah*. Selain itu, di bawah jaminan tersebut, defendan-defendan telah bersetuju untuk membayar atas tuntutan, bukan hanya sebagai penjamin tetapi sebagai penghutang utama, keseluruhan wang yang kena dibayar dan

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- A terhutang kepada pelanggan (lihat perenggan 50 & 52).]

Notes

For cases on application for summary judgment, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9868–9950.

- B

Cases referred to

- Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2010] 3 MLJ 702, HC (refd)
- C *Attorney-General of the Duchy of Lancaster v London and North Western Railway Company* [1892] 3 Ch 274, CA (refd)
- Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839, CA (refd)
- Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd* [2003] 2 MLJ 408; [2003] 2 AMR 177, CA (refd)
- D *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ Rep 14, SC (refd)
- Castro v Murray* (1875) LR 10 Exch 213 (refd)
- Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212, PC (refd)
- JRI Resources v Kuwait Finance House* (Appeal No B-02(IM)(NCVC)1929-11 of 2014) (unreported), CA (refd)
- E *Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor* [2017] 2 MLJ 69, CA (refd)
- Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor* [2011] 3 MLJ 26; [2011] 4 CLJ 654, HC (refd)
- F *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 2 CLJ 220, FC (refd)
- Vernazza, Re* [1959] 2 All ER 200, QBD (refd)
- Tan Sri Abdul Khalid Ibrahim v Bank Islam (M) Bhd* [2013] 3 MLJ 269; [2013] 4 CLJ 794, CA (refd)
- G *Tan Wei Hong & Ors v Malaysia Airlines System Berhad & Ors* [2017] MLJU 487, CA (refd)
- Woolley Development Sdn Bhd v Mikien Sdn Bhd* [2008] 1 MLJ 585, CA (refd)

Legislation referred to

- H Central Bank of Malaysia Act 2009 ss 56, 57, 94, 95, 96, 97, 98
- Contracts Act 1950 s 21
- Islamic Banking Act 1983
- Rules of Court 2012 O 14, O 18, O 18 r 19(1), (1)(a), (1)(b), (1)(d)

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Appeal from: Suit No 22M-33–03 of 2015 (High Court, Kuala Lumpur)

A Onn (Onn & Partners) in Civil Appeal Nos W-02(IM)(MUA)-1370–08 of 2015, W-02(IM)(MUA)-1371–08 of 2015 and W-02(IM)(MUA)-1450–09 of 2015 for the appellant.

Gopal Sreenevasan (S N Tan with him) (Sreenevasan Young) in Civil Appeal Nos W-02(IM)(MUA)-1480-09 of 2015 and W-02(IM)(MUA)-1481-09 of 2015 for the appellant. A

Muhammad Shafee Abdullah (Ahmad Redza bin Abdullah and Wan Aizuddin bin Wan Mohammed with him) (Sharizat Rashid & Lee) in Civil Appeal Nos W-02(IM)(MUA)-1521-09 of 2015 and W-02(IM)(MUA)-1522-09 of 2015 for the appellants. B

Chan Kok Keong (Samuel Tan with him) (Shook Lin & Bok) in Civil Appeal Nos W-02(IM)(MUA)-1370-08 of 2015, W-02(IM)(MUA)-1371-08 of 2015, W-02(IM)(MUA)-1450-09 of 2015, W-02(IM)(MUA)-1480-09 of 2015, W-02(IM)(MUA)-1481-09 of 2015, W-02(IM)(MUA)-1521-09 of 2015 and W-02(IM)(MUA)-1522-09 of 2015 for the respondents. C

Zawawi Salleh JCA (delivering judgment of the court):

[1] For ease of reference, in this judgment, parties will be referred to as they were in the High Court. D

THE ANTECEDENTS

[2] These appeals arose out of the High Court's decision on 27 August 2015, granting: E

(a) the plaintiff's ('Kuwait Finance House (M) Bhd') application for summary judgment under O 14 of the Rules of Court 2012 against the first, second and fourth defendants ('Jasmy bin Ismail, Shahrir Abdul Jalil and Mohamad Najib Ishak') for the outstanding amounts under an *Ijarah* facility granted by the plaintiff to one Jas Marine (L) Ltd ('the customer') which are guaranteed by the defendants ('the summary judgment applications'); and F

(b) the plaintiff's application under O 18, O 18 r 19(1)(a), (b) and (d) of the Rules of Court 2012 to strike out the first, second and fourth defendants' counterclaim against the plaintiff ('the striking out applications'). G

[3] It is pertinent to note that the plaintiff had already obtained a judgment against the customer on 2 January 2013 in another suit (Kuala Lumpur High Court Suit No 22A-1334-11 of 2012). In these proceedings, summary judgment has been entered against one Azlin bin Khalid ('Azlin') (another guarantor, the third defendant in the court below) on 29 July 2015. H

[4] Azlin's appeal against the summary judgment application (W-02(IM)(MUA)-1450-09 of 2015) is also to be heard together with other appeals. I

A [5] So, all together there are seven appeals of the similar nature before us and they are as follows:

The summary judgment applications:

- B** (i) Civil Appeal No W-02(IM)(MUA)-1521-09 of 2015 ('the first, and second defendants' appeal');
- (ii) Civil Appeal No W-02(IM)(MUA)-1480-09 of 2015 ('the third defendant's appeal');
- C** (iii) Civil Appeal No W-02(IM)(MUA)-1481-09 of 2015 ('the fourth defendant's appeal'); and
- (iv) Civil Appeal No W-02(IM)(MUA)-1450-09 of 2015 ('Azlin's appeal').

D The striking out application:

- (v) Civil Appeal No W-02(IM)(MUA)-1523-09 of 2015 ('the first and second defendants' appeal');
- (vi) Civil Appeal No W-02(IM)(MUA)-1480-09 of 2015 ('the third defendant's appeal');
- E** (vii) Civil Appeal No W-02(IM)(MUA)-1481-09 of 2015 ('the fourth defendant's appeal').

F [6] We heard these appeals on 10 November 2016 and at the conclusion of the submissions, we unanimously made the following orders:

- (a) we allowed the appeals in respect of the summary judgment applications; and
- G** (b) we dismissed the appeals in respect of the striking out applications.

[7] The parties had agreed that the costs shall be costs in the cause here and below.

H THE BACKGROUND FACTS

[8] The essential facts as culled from the submissions of the parties may be shortly stated as follows

- I** (a) the third defendant was a director and shareholder of an oil and gas company, Offshoreworks Holdings Sdn Bhd ('OSW'). In 2008, OSW secured a contract for subsea works with Shell Sarawak valued in excess of RM1 billion over a seven year period. OSW required a DSV Vessel ('the vessel') to execute the contract ('the Shell contract');

- (b) the third defendant approached the first, second and fourth defendants to incorporate an SPV, namely JAS Marine (L) Ltd ('customer') to acquire the vessel and thereafter charter the same to OSW in order to perform the Shell contract; A
- (c) the customer approached the plaintiff to obtain financial assistance. The plaintiff had granted the customer financing facilities of RM175,950,000 comprising the following: B
 - (i) an *Ijarah* facility of up to RM161,100,000 ('the *Ijarah* facility'); C
 - (ii) a *Wakalah* letter of credit facility ('WLC-i facility') and a *Murabahah Tawarruq* Financing ('the MTQ1 facility') of up to RM10,800,000; and D
 - (iii) a *Murabahah Tawarruq* facility ('the MTQ2 facility') up to RM4,050,000. D
- (d) the appeals herein concern only with the *Ijarah* facility as the other facilities have since been settled;
- (e) in respect of the *Ijarah* facility and by the financing agreements:
 - (i) the defendant was to purchase from the customer the vessel for a purchase price of RM161,100,000; E
 - (ii) the beneficial interest and ownership in the vessel lies with the defendant;
 - (iii) the defendant agreed to lease the vessel to the customer for a duration of a lease term of 84 months or such extended period as the defendant may agree in writing; F
 - (iv) the customer was obliged to make quarterly payments of the lease rentals to the defendant unless there was early termination of the *Ijarah* agreement; G
 - (v) the customer irrevocably and unconditionally undertook to purchase the *Ijarah* asset from the defendant upon termination of the lease term at the 'termination sum'; H
 - (vi) the termination sum on early termination of the lease term shall be the aggregate of:
 - (1) the purchase price for the remaining duration of the lease term;
 - (2) arrears on the 'variable element'; I
 - (3) arrears on compensation (*at-Tawidh*) imposed on late payments of lease rentals under *Ijarah* agreement; and
 - (4) all costs and expenses incurred by the defendant under the *Ijarah* agreement.

- A** (f) at the time the financing agreements were executed, the purchase price of the vessel was stated to be RM161,100,000, the estimated Ringgit Malaysia equivalent for the purchase of the vessel which was denominated in United States dollars. However, when the vessel was purchased by the defendants from the customer, the actual purchase price was RM159,300,495 ('the purchase price') calculated based on the prevailing United States dollar exchange rate;
- B**
- (g) the purchase price was paid by the plaintiff to the customer on 6 November 2008;
- C**
- (h) the lease rentals were thus all calculated based on the purchase price;
- (i) by a joint and several guarantee dated 30 October 2008 ('the first and second defendants' guarantee') executed by the first and second defendants' together with third defendant, and a personal guarantee dated 4 December 2009 ('the fourth defendant's guarantee') executed by the third defendant ('the guarantees'), the defendants agreed, not merely as surety but as principal debtor, to pay on demand to the plaintiff all monies owing by the customer to the plaintiff;
- D**
- E** (j) the financing facilities were secured, inter alia, by the following:
- (i) assignment of project accounts dated 29 October 2008 between the customer and the plaintiff ('the assignment'), whereby three accounts of the customer were absolutely assigned to the plaintiff. One of these was an escrow account into which was to be credited with all the charter proceeds and other payments received by the customer under a bareboat charter agreement ('the Escrow account'); and
- F**
- (ii) debenture dated 29 October 2008 ('the debenture') granted by the customer in favour of the defendants creating a charge over the assets of the customer, including the vessel;
- G**
- (k) the customer had defaulted in making payments, including the lease rentals, on due dates despite the defendants' demands;
- H**
- (l) in 2011, payments made by the customer, including the monies in the Escrow account, were utilised to fully settle the MTQ1 facility and MTQ2 facility as well as to partially settle the *Ijarah* facility;
- (m) on 7 November 2012 an action was filed by the plaintiff against the customer and the defendants herein under Kuala Lumpur High Court Suit No 22A-1334-11 of 2012 ('the first suit') for the outstanding sum owed under the *Ijarah* facility;
- I**
- (n) on 2 January 2013, a judgment was entered against the customer in the first suit for the *Ijarah* facility sum ('the JAS Marine judgment');

- (o) on 4 March 2013, at the request of the defendants, the claim against them under the first suit was discontinued, with liberty to file afresh; A
- (p) the customer has since made some payments but failed to pay the full judgment sum;
- (q) the plaintiff, has through its solicitors, Messrs Shook Lin & Bok, issued a letter dated 18 December 2014 to the defendants demanding full payment of all sums due under the *Ijarah* facility. The defendants failed to settle the outstanding sums; B
- (r) on 5 February 2015, the plaintiff, has pursuant to the debenture, appointed receivers and managers ('R&M') over the assets of the customer. The plaintiff has not received any proceeds from the receivership as yet. The vessel had sailed out of Malaysian waters out of the R&M's possession; C
- (s) on 10 March 2015, the plaintiff filed the present action in the High Court against the four guarantors; D
- (t) on 29 July 2015, the plaintiff's application for summary judgment against the third defendant ('Azlin'), was allowed with costs on the same day; E
- (u) on 27 August 2015, the plaintiff's applications of 16 April 2015 to enter summary judgment against the defendants and to strike out the defendants' counterclaim were allowed by the learned judge; and
- (v) being dissatisfied with the impugned decisions, the defendants filed these appeals to the Court of Appeal. Hence, these appeals before us. F

THE ISSUE

[9] Learned counsel for the defendants raised a number of issues in these appeals. In our view, the central issue that is cross cutting the entire appeals is simply this: Did the learned judge err in granting the summary judgment applications and the striking out applications in favour of the plaintiff? G

THE APPLICABLE LEGAL PRINCIPLES SUMMARY JUDGMENT H

[10] The principles relating to an applications for summary judgment are well settled. In the case of *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ Rep 14, the Supreme Court states: I

In our view, basic application under O 14 made by the plaintiff for summary judgment without trial, the general principles established are that the plaintiff has to satisfy the court that the defendant plainly and obviously has no defence to the plaintiff's claim or part of the plaintiff's claim. If the plaintiff's is able to satisfy the court, then summary judgment should be entered in the plaintiff's favour. On the

- A** other hand, if the defendant can show that there is a serious conflict of material facts as disclosed in the opposing affidavits, or there is otherwise a triable issue worthy of judicial investigation in the trial of the action, or there is an important and difficult point of law requiring further and mature consideration at the trial, summary judgment should be refused.
- B** [11] In the same vein, in the case of *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 2 CLJ 220, The Federal Court states:
- C** ... We think it appropriate to remind ourselves once again that in every application under O 14, the first considerations are (a) whether the case comes within the order; and (b) whether the plaintiff has satisfied the preliminary requirements proceedings under O 14. For the purpose of an application under O 14, the preliminary requirements:
- D** (i) the statement of claim must have been served on the defendant;
(ii) the defendant must have entered an appearance;
(iii) the affidavit in support of the application must comply with the requirements of Rule 2 of the Order 14.
- E** ... if the plaintiff fails to satisfy either of these considerations, the summon may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and becomes entitled to judgment. This burden then shifts to the defendant to satisfy the court why judgment should not be given against them ...
- F** [12] In *Woolley Development Sdn Bhd v Mikien Sdn Bhd* [2008] 1 MLJ 585, this court held that:
- G** [46] The plaintiff in a summary judgment application first needs to establish a prima facie case that 'he is entitle to judgment'. The burden then shifts to the defendant to satisfy the court why judgments should not be given against him (see *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 per Seah FJ). 'Ought' in O 81 r 3, is an expression of a strong probability. In other words, the issue in dispute must be critically investigated is genuine. This is what a defendant needs to prove to be entitled to a trial of that disputed issue.
- H**
- I** [13] In others words, in deciding whether a defendant has raised a triable issue, the court must look at the complete account of events put forth by the parties. The mere fact that the defendant supports his defence by way of an affidavit does not mean that the court must accept the evidence as if it was probably accurate. Rather, the court must independently assess, having regard to the evidence as a whole, if his defence is credible. In the final analysis, the court will grant summary judgment only if it is satisfied that there is no reasonable probability that the defendant has a real or bona fide defence in

relation to the identified issue (see *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212). A

STRIKING OUT

[14] The legal principles relating to striking out pleadings are settled and there are numerous judgments of the Malaysian courts setting out those principles. B

[15] This court has reiterated the principles in *Tan Wei Hong & Ors v Malaysia Airlines System Berhad & Ors* [2017] MLJU 487. We do not wish to regurgitate the principles in detail here. Suffice to say that an application to strike out a claim at the interlocutory stage under sub-para (a) of O 18 r 19(1) of the Rules of Court 2012 can only be exercised when it is patently clear that there is no reasonable cause of action on the face of pleadings. The mere fact that a case is weak and not likely to succeed is not a valid ground for striking out a claim under this ground. The requirement under is strict. The pleading itself must fail to make out a reasonable cause of action without reference to other evidence before it can be struck out under sub-para (a). However, where the court proceeds to decide an application under any other sub paragraphs, affidavit evidence should be admissible. C
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[16] Subparagraph (b) deals with pleadings which is ‘scandalous, frivolous or vexations’, while sub-para (1)(d) deals with ‘an abuse of the process of the court’. The words ‘frivolous or vexations’ generally refer to a groundless action of statement of claim with no prospect of success, often raised to embarrass or annoy another party to the action (see *Attorney-General of the Duchy of Lancaster v London and North Western Railway Company* [1892] 3 Ch 274 and *Re Vernazza* [1959] 2 All ER 200). F
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[17] Subparagraph (d) deals with pleadings with is ‘an abuse of the process of the court’. The phrase ‘abuse of the proses of the court’ had been described generally to refer to situations where the court’s proses is used for unlawful object and not for the actual purpose intended to achieve justice (see *Castro v Murray* (1875) LR 10 Exch 213). H

ANALYSIS AND DECISION

[18] Applying the legal principles above, we shall now proceed to discuss the grounds of appeal urged upon us by the defendants. I

[19] At the outset, it is pertinent to note that Islamic banking and finance in Malaysia is governed by both Islamic law and civil law. In *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd* [2003] 2 MLJ 408; [2003]

- A 2 AMR 177, Abdul Hamid Mohamad JCA (as His Lordship then was) held that even though the facility was an Islamic banking facility, it does not mean than the applicable laws are not the same laws (the provisions of the Contracts Act 1950).
- B [20] In the case of *Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor* [2017] 2 MLJ 69, in delivering the judgment of the Court of Appeal, Rohana Yusuf JCA had this to say:
- C [30] The English court had also applied English laws to enforce a Murabahah contract. In *Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems NV and others* [2002] All ER (D) 171 (Feb) after hearing evidence from Shariah scholars on the principles of Shariah concerning the nature of a Murabahah agreement, the Court found that the agreement in dispute did not satisfy the essential requirements of Murabahah, yet found the English law applies and had given effect to the contract based on English law. Similarly in the case of *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd and Others* [2004] 4 ALL ER 1072,
- D the principles of Shariah in the English case was inserted by virtue of the governing law clause under the agreement. The governing law clause was stated as ‘*subject to the principles of Glorious Shariah, this agreement shall be governed by and construed in accordance with the laws of England*’. We agreed with that approach and in our view
- E the validity of the contract in this case should be viewed from the law that generally governs the contract between parties in this country. This approach would be in consonant with what was stated in the case of *Bank Rakyat v Emcee*. We are therefore of the view firstly, the provisions of the Contracts Act 1950 still govern Islamic contracts..
- F [21] In the case of *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839, this court held that since the governing law of Islamic banking is the same law of contract, the same principles of contract apply in deciding Islamic banking case.
- G [22] Having said that, we must hasten to add that ss 56 and 57 of the Central Bank of Malaysia Act 2009 (‘the CBMA 2009’) contain clear and ambiguous provisions to the effect that whenever there is any Shariah question arising in
- H any proceedings relating to the Islamic financial business, it is mandatory to invoke s 56 and refer it to the Shariah Advisory Council (‘SAC’) of Bank Negara. Section 57 of the CBMA 2009 then states that such ruling shall be binding on the court or arbitrator referring the matter to the SAC, in effect removing from the courts the power to decide on Shariah law questions in Islamic finance (see *Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor* [2011] 3 MLJ 26; [2011] 4 CLJ 654 (HC); *Tan Sri Abdul Khalid Ibrahim v Bank Islam (M) Bhd* [2013] 3 MLJ 269; [2013] 4 CLJ 794 (CA)). According to Tun Hamid Mohamad (the former Chief Justice of Malaysia), these provisions were made to allow:
- I (a) speedy rulings on issues; and

(b) consistency of rulings on Shariah issues,

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and non-compliance with issued guidelines could result in administrative penalties found in ss 94 to 98 of the CBMA 2009 (see Tun Abdul Hamid Mohamad's *Malaysia as an Islamic Finance Hub, Malaysian law as the law of Reference & Malaysian Courts as the Forum for Settlement of Disputes*, 12th Emeritus Professor Ahmed Ibrahim Memorial Lecture).

B

PARTIES' COMPETING SUBMISSIONS

[23] Tan Sri Muhammad Shafee Abdullah, whose submissions were adopted by other counsel appearing for the defendants, sought valiantly and eloquently to persuade the court that the defenses filed by the defendants disclose several bona fide triable issues meriting a full blown trial. They are as follows:

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(a) *common mistake*

The guarantees executed by the defendants are void and unenforceable as they were executed under a common false and fundamental assumption that the charter with OSW was for a fixed term and non-terminable. The defendants rely on the common law doctrine of mistake and s 21 of the Contracts Act 1950.

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(b) *breach of SAC resolution — maintenance*

The plaintiff was in breach of the *Ijarah* principles as embodied in SAC resolution whereby the plaintiff unlawfully transferred the liability for major maintenance and structural repair of the vessel to the borrower. This was allegedly done by compelling the borrower to execute a service agency agreement when the borrower would assume all liability for a consideration of RM1. This transfer of liability is also contrary to the express term of cl 6.2 of the *Ijarah* agreement.

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(c) *put option void*

The plaintiff failed to reduce the cost of major maintenance and structural repair from the claim (amounting to RM40m). Accordingly, the put options exercised by the plaintiff, which forms the very basis of their claim, was bad in law and invalid.

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- A (d) *failure to refer to SAC under s 56 of the CBMA 2009*
By transferring their liability for major maintenance and structural repair under the service agency agreement for a consideration of RM1, the act amounted to not only triable issues but also a question involving Shariah issue and ought to be referred to SAC pursuant to s 56 of the CBMA 2009. The learned judge did not have the jurisdiction to determine the question of Shariah which had arisen.
- B
- (e) *reliance on evidence not before the court*
Despite all parties agreeing to exclude a particular document purporting to acknowledge the debt and any imputation arising therefrom, the learned judge in her grounds of judgment elected to rely on that particular document and make a conclusion that by virtue thereof, the defendants are estopped from raising any issue in relation to their liabilities. Since the said document did not form part of the affidavits served upon the defendants, they were in no position to explain, refute, deny or clarify this document.
- C
- D It is trite that an O 14 is a contest of affidavits allowing the parties to refute, affirm or rebut issue or allegations implying that if evidence is not introduced by an affidavit, it is not before the court.
- E
- [24] On behalf of the fourth defendant, learned counsel submitted that the learned judge erred in holding that there are no triable issues or bona fide defence raised by the fourth defendant.
- F
- [25] Learned counsel for the fourth defendant posited that among the triable issues are as follows:
- G (a) whether the fourth defendant was induced to execute the 2009 personal guarantee by a material representation by the plaintiff that the 2009 personal guarantee was necessary for the purpose of a restructuring of the financing facilities. However, the proposed restructuring never took place. Consequently, since the representation was false in that no restructuring took place, the fourth defendant as a matter of law is entitled to and did avoid the personal guarantee;
- H
- (b) whether there was collateral understanding/contract concluded between the second defendant and the borrower's adviser Dato' Ishda Ismail and acting chief executive officer and chief recovery officer of the plaintiff on 8 February 2015 whereby the plaintiff agreed to grant necessary indulgence to the borrower and the defendants in the High Court below
- I of four months commencing February 2015 to do the following:
- (i) KFH had recognised the recent slump in the oil and gas industry and had agreed to allow the borrower to sell the vessel if they could procure a purchase price above approximately USD20m. In the

event of successfully finding a purchaser at that price, KFH would release the guarantees; or

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- (ii) KFH would give the borrower six months to procure a long-term charter of approximately two years whereby the proceeds of the charter will be managed by the receiver and manager to repay the loan less operational expenses.

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[26] It was contended that before either of these two time limits could expire, the plaintiff instituted this suit. This is a breach of this collateral agreement between the guarantors and the plaintiff.

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[27] In reply, learned counsel for the plaintiff submitted that the learned judge was correct in holding that the defendants had failed to raise any bona fide triable issue to oppose the summary judgment applications. The case before the High Court was a plain and obvious case for a summary judgment to be entered as there are no triable issues.

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[28] According to learned counsel, the following findings by the learned judge were borne out by the affidavits filed by the parties:

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- (a) that the plaintiff did not know of the non-terminable nature of the Bareboat Charter Agreement between the borrower and Offshore Subsea dated 21 July 2008 ('Bareboat Charter') and did not cause the said Bareboat Charter to become terminable;
- (b) that the non-terminable nature of the Bareboat Charter was never a pre-condition or a pre-condition or a pre-requisite term of the financing facilities (defined below) and the joint and several guarantee dated 30 October 2008, and as such the nature of the Bareboat Charter has no bearing whatsoever on the validity of the financing facilities of the 2008 guarantee;
- (c) that there was no basis for the purported collateral understanding and/or contract between, inter alia, the plaintiff and the fourth defendant that the plaintiff would postpone any action against it for a period of six months, and therefore the suit against the fourth defendant was not premature;
- (d) the financing facilities did not breach any Shariah principles on the part of the plaintiff;
- (e) that the financing facilities, namely the *Ijarah* agreement has been approved by the SAC and consequent upon that, the High Court and this court cannot decide on the issue;
- (f) that the financing facilities were voluntarily entered into and executed by the first and second defendants as directors on behalf of the borrower

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- A and therefore they are precluded from attempting to invalidate the same after the financing facilities granted were utilised and enjoyed;
- (g) that the fourth defendant failed to produce the evidence of his payment of expenses to maintain and repair the vessel. In any event, the correct party to claim the same was the borrower; and
- B (h) that there is no merit to fourth defendant's contention that the personal guarantee dated 4 December 2009 is void as it was subject to the completion of a restructuring of the financing facilities, which never occurred.
- C

OUR FINDINGS

- [29] We do not intend to respond item by item to the grounds raised by learned counsel for the defendants. It is well established that among the principles applicable for summary judgment is that if the affidavits filed by a defendant raises *one* bona fide triable issue, then the suit between the parties should proceed to a full blown trial. At this stage, the defendants need not prove their defences. All that is required is to raise a triable issue.
- D

- E [30] In our view, among the bona fide triable issues raised by the defendants are as follows.

- F *Whether the financing agreements and the financing facilitation are in breach of SAC resolution*

- [31] Under cl 6.2 of the *Ijarah* agreement, the plaintiff expressly covenants that they shall be responsible for all major maintenance and structural repair. Clause 6.2 is in the following terms:

- G *Maintenance of the Ijarah Asset*

- (a) The customer shall, at its own cost and expense, be responsible for the performance of all Ordinary Maintenance and Repair.
- (b) *KFHMB shall, as its own cost and expense, be responsible for Major Maintenance and Structural Repair (in respect of which the customer will act as the servicing agent for KFHMB under the Service Agency Agreement).* (Emphasis added.)
- H

- [32] According to the fourth defendant's claim, major maintenance and structural repairs have accumulated to approximately RM40m.
- I

[33] The SAC ruling in its 29th meeting (25 September 2002); 36th meeting (26 June 2003) and 104th meeting (26 August 2010) resolved as follows:

- the owner of the asset *is not allowed to transfer the obligation* to bear the costs of maintenance and takaful coverage of the leased asset to the lessee. However, the owner may appoint the lessee as his agent to bear those costs which *will be offset in the sale transaction of the asset at the end of the lease period*. (Emphasis added.) A
- [34] In tandem with cl 6.2, the plaintiff appointed the borrower to undertake all major maintenance and structural repairs pursuant to a service agency agreement dated 29 October 2008. B
- [35] On the surface, this would appear to be compliant with the SAC resolution. However, the service agency agreement was in fact a device created by the plaintiff to transfer the entire financial obligation for major maintenance and structural repairs for a mere consideration of RM1. Essentially, the borrower assumed the entire RM40m cost of maintenance for RM1. C
- [36] The critical issue is not the appointment of the borrower as the service agent, but the transfer of the financial obligation. On a plain reading of the SAC resolution, it would appear that this transfer of liability is unlawful. This is further reinforced by the final caveat of the resolution which states that at the end of the lease, there shall be an 'offset' against the sale transaction for all costs incurred. D
- [37] The High Court can only ascertain whether or not these financing agreements and/or financing facilities are contrary to principles of Shariah by way of the following: E
- (a) referring to the rulings made by the SAC;
- (b) referring the matter for the determination of the SAC for advice or ruling pursuant to s 56 of the CBM 2009; and/or F
- (c) reference to existing principles or rulings issued by Islamic banking authorities. G
- [38] It is pertinent to note that on 15 September 2015, the Court of Appeal decided on an appeal bearing reference: *JRI Resources v Kuwait Finance House* (Appeal No B-02(IM)(NCVC)1929-11 of 2014) (unreported) ('JRI appeal'). The said appeal was strikingly similar in facts to this case. It also concerned an *Ijarah* facility for a vessel in the oil and gas industry. Even the financiers happened to be the plaintiff. The pertinent common issue, however, is that the plaintiff in the *JRI appeal* also attempted to transfer the liability for major maintenance and structural repairs and takaful. H
- [39] In the *JRI appeal*, the plaintiff expressly undertook costs of major maintenance and structural repairs in one clause but yet in another clause, I

- A transferred the liability to the borrower. The borrower was compelled to accept a nominal consideration of RM1 and thereafter assume all liabilities for major maintenance and structural repair. Unlike the *JRI appeal*, this transfer of liabilities was contained in another document (service agency agreement).
- B [40] The appellant in that case also argued upon the breach of the same SAC Resolution and that the issue ought to have been referred to SAC for a ruling under s 56 of the CBMA 2009. The Court of Appeal held that the summary judgment was to be set aside and the issue of transferring maintenance costs was to be referred to the SAC. Thereafter, the matter is to be remitted for trial.
- C [41] The implication of breaching the SAC resolution may have far reaching consequences. If it is proven that the transfer of liability is unlawful, that would mean that the borrower should have been credited with RM40m and in such circumstances may well have been in an improved cash flow position to service the facility. These are matters which should be properly litigated before a full trial.
- D *Whether the put option notice dated 1 April 2011 was in breach of SAC resolution*
- E [42] Learned counsel for the defendants argued that on the face of the current structure of the *Ijarah*, the plaintiff purportedly entered into an asset acquisition of the vessel and thereafter leased the vessel back to the borrower with an option to purchase the vessel incorporated in the final leased payment.
- F In the event of a premature breach, the plaintiff shall exercise a put-option to compel the borrower to acquire the vessel at an agreed formula. This structure of *Ijarah* is known as *Ijarah Muntahia Bi Al-Tamlik*.
- G [43] The defendants contended that in *Al-Ijarah Al-Muntahia Bi-Tamlik*, the liability or indebtedness of the defendants can only arise if the plaintiff exercises a put-option in the manner and format as prescribed in cl 3.2 and 14.1 of the *Ijarah* agreement ('put option'). this essentially operated as resale of the vessel to the borrower and from there arises any indebtedness by the borrower to the plaintiff in the entire transaction.
- H [44] Learned counsel for the defendants vehemently argued that the plaintiff had failed to exercise this put option and is therefore precluded from filing this action against the defendants.
- I [45] Further, it was argued that for there to be a valid put option, the value of the vessel pursuant to the put option must recognise the offset/set off of all maintenance and structural repairs undertaken by the borrower since the inception of the *Ijarah*, to which the plaintiff alone is fully liable for pursuant to cl 6.2 of the *Ijarah* agreement.

[46] As we have alluded to earlier, the SAC ruling in its 29th meeting dated 25 September 2002, 36th Meeting dated 26 June 2003 and the 104th meeting dated 26 August 2011 resolved as follows:

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the owner of the asset is not allowed to transfer the obligation to bear the costs of maintenance and takaful coverage of the leased asset to the lessee. *However, the owner may appoint the lessee as his agent to bear those costs which will be offset in the sale transaction of the asset at the end of the lease period.* (Emphasis added.)

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[47] We agree with the submissions of learned counsel for the defendants that the above matters give rise to bona fide Shariah issue requiring the High Court to invoke s 56 of the CBMA 2009 and the learned judge is not in position to decide on Shariah law questions in Islamic finance.

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[48] In the result, the appeal by the defendants in respect of the summary judgment application must succeed.

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THE STRIKING OUT APPLICATIONS

[49] The first, second and fourth defendants' counterclaim, sought, inter alia, the following:

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- (a) a declaration that the guarantee date 30 January 2008 and 4 December 2009 ('the guarantees') are null and void ab initio;
- (b) a declaration that the *Ijarah* agreement, master facility agreement and asset purchase agreement, all dated 29 October 2008, are null and void ab initio and contrary to the Islamic and/or Shariah laws and principles applicable in Malaysia;
- (c) a declaration that the plaintiff in granting the facility to the customer, ('JAS Marine'), had acted beyond the scope of their Islamic Banking licence granted by the Islamic Banking Act 1983; and
- (d) specifically in respect of the fourth defendant only, damages of RM40,115,868.10 as well as general damages as loss and damages suffered in undertaking all major maintenance of the asset which forms the subject matter of the *Ijarah* agreement ('the vessel').

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[50] We agree with the submissions of learned counsel for the plaintiff that the defendant's attempt to invalidate their guarantees fly in the face of the undisputed contemporaneous documents. The defendants had admitted the debt in writing for a sum of RM146,831,579.81 as at 30 April 2011 (including the outstanding lease rentals of RM143,37,234.37) under the *Ijarah* facility.

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[51] We have carefully perused the affidavits filed by parties and the submissions urged upon us by learned counsel. It is undisputed that the

- A plaintiff had paid the purchase price of RM159,300,495 to the customer on 11 June 2008 to purchase the vessel. As the customer had defaulted in payments under the *Ijarah* agreement, the plaintiff terminated the *Ijarah* agreement and the lease by way of its letter of 1 April 2001. It is not disputed that the customer had defaulted in payments under the *Ijarah* facility as the
- B plaintiff had obtained judgment against the customer on 2 January 2013.

[52] Under the guarantee, the defendants had agreed to pay on demand, not merely as surety but as principal debtor, all monies due and owing to the customer.

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[53] In this respect, perhaps it would be appropriate to refer to the case of *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2010] 3 MLJ 702, where the High Court observed:

- D the parties here have agreed before executing the agreement, without any undue pressure or persuasion, to the preconditions of the Islamic based contracts. Parties also agreed to be bound by the terms to conclude the agreement. The facility was structured in such way to accommodate the defendant's request for such capital.

- E ... Thus it is the duty of this court to enforce the terms that have been agreed by parties. Based on the above, I find no reasons to declare the facility agreement to be void and unenforceable.

CONCLUSION

- F [54] For the foregoing reasons, we would allow the appeal in respect of summary judgment applications and dismiss the striking out applications. So ordered.

- G *Appeal in respect of summary judgment applications allowed; striking out applications dismissed.*

Reported by Fatin Mohd Ismail

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